IN THE

Supreme Court of the United States

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CLERK

October Term, 1950
No. 334

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy of the Estate of Exeter Refining Company,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

FRED N. HOWSER,
Attorney General;
WALTER L. BOWERS,
Assistant Attorney General;
JAMES E. SABINE,
Deputy Attorney General;
EDWARD SUMNER,
Deputy Attorney General,
600 State Building, Los Angeles 12, California,
Attorneys for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, California State Board of Equalization, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on June 28, 1950.

Opinions Below.

The memorandum opinion of the Referee in Bankruptcy is unreported, as is the memorandum opinion of the District Court [R. 36-37]. The opinion of the Court of Appeals [R. 64-75] is reported in 183 F. 2d 489. The District Court's order affirming the Order of Referee was predicated upon the reasoning contained in a District Court Memorandum Opinion dated April 14, 1948, and filed in the matter of Alta Vineyards Company, a corporation, Debtor [R. 44-50].

Jurisdiction.

The judgment of the Court of Appeals was entered on June 28, 1950 [R. 63-64]. A timely petition for rehearing was denied on September 13, 1950 [R. 76]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251(1); 11 U. S. C., Section 47; Bankruptcy Act, Section 24.

Questions Presented.

1. Whether a receiver appointed in proceedings under Chapter XI of the Bankruptcy Act and conducting a debtor's business is under a duty to file tax returns due subsequent to the receiver's appointment although relating to the debtor's activities prior to the commencement of Chapter XI proceedings.

2. Whether the penalty imposed by the California Sales and Use Tax Law for failure to file returns as prescribed by that law is properly imposed upon a Chapter XI receiver in a case where returns for a pre-Chapter XI period were due subsequent to the commencement of proceedings under Chapter XI of the Bankruptcy Act and during the period the taxpayer-debtor's business was operated by that receiver.

3. Whether the penalty imposed by the California Sales and Use Tax Law for failure to pay, within the time prescribed, taxes duly assessed by petitioner under that law is properly imposed upon a Chapter XI receiver in cases where an assessment is made, and becomes final, after the receiver's appointment although relating to a taxable period terminating prior to the commencement of Chapter XI proceedings.

4. Whether the aforesaid penalty items constitute expenses of administration, inasmuch as they are attributable to the receiver's failure, during his operation of the debtor's business, to file returns and pay assessments as prescribed by the State taxing statute; or whether said penalty items should, in any event, have been allowed as contingent claims existing against the debtor immediately prior to the commencement of Chapter XI proceedings inasmuch as the amount of those penalty items could have been determined by a simple mathematical computation.

Statutes Involved.

The pertinent statutory provisions will be found in the Appendix.

Statement.

Exeter Refining Company, a California corporation (hereinafter referred to as "Exeter"), filed its petition under Chapter XI of the Bankruptcy Act of the District Court of the United States for the Southern District of California, Central Division, on the 16th day of October, 1947 [R. 2-12]. On the same day said petition was approved and the matter referred to the Referee below [R. 12-13]. On October 17, 1947, George T. Goggin, the respondent herein, was appointed and qualified as Receiver in Bankruptcy of Exeter's Estate [R. 15, 32]. As the duly appointed Receiver in Bankruptcy, respondent had authority to operate the business of the debtor and in fact did operate that business [R. 32].

In the course of the proceedings under Chapter XI, petitioner, the duly constituted State agency charged with the enforcement and collection of taxes under the California

Sales and Use Tax Law, duly filed its proof of claim for $3,926.36, said amount consisting of tax principal not in issue here, in the sum of $3,503.00, interest (which is likewise not in issue here), and two penalty items amounting to $47.54 and $293.48 [R. 33, 57, 59]. Said proof of claim included a demand for an additional penalty in the sum of $350.30 if payment of the aforesaid $3,926.36 were not made by March 7, 1948 [R. 33, 58, 59]. Petitioner's proof of claim was duly filed on February 12, 1948, and was predicated upon an assessment dated February 6, 1948 [R. 59, 60].

On March 6, 1948, one day prior to the accrual of the $350.30 penalty item, respondent ~~petitioner~~ filed objections to the three aforesaid penalty items [R. 13-14], and no portion of the total amount claimed by petitioner was paid to it by respondent until subsequent to March 7, 1948 [R. 16]. It should also be noted that as of March 7, 1948, a proposed plan of arrangement had not as yet been approved or passed upon [R. 17], although a plan of arrangement providing for an extension as well as a composition was subsequently duly confirmed [R. 32-33].

The character of the three penalty items involved can be succinctly set forth. The $47.54 item is attributable to Exeter's failure to file returns due under the California Sales and Use Tax Law prior to the commencement of Chapter XI proceedings [R. 16]. The $293.84 item is attributable to the fact that returns required by the California Sales and Use Tax Law for the period July 1, 1947, to October 16, 1947, said returns being due subsequent to respondent's appointment on October 17, 1947, were not filed within the prescribed statutory period [R. 16]. These failure-to-file penalties are imposed by Section 6511 of the

California Sales and Use Tax Law. The $350.30 item accrued on March 7, 1948, pursuant to the provisions of Section 6565 of the California Sales and Use Tax Law as a result of respondent's failure to pay the February 6, 1948, assessment for the period for which no returns were filed [R. 16, 17, 59, 60].

The receiver's objections duly came on for hearing and the Referee allowed the $47.54 penalty item as a general unsecured debt to be paid by the debtor under the extension provisions of its confirmed plan of arrangement pursuant to the provisions of Section 307 of Chapter XI of the Bankruptcy Act. Although his ruling in that respect was affirmed by the District Judge, that item is not at issue here since respondent did not take a cross-appeal from that portion of the District Judge's Order [R. 17, 34, 36-38]. The two remaining penalty items, $293.48 and $350.30, were disallowed by the Referee and his ruling in that respect was affirmed by the District Judge [R. 17-19, 34-38].

The Court below affirmed the Order of the District Court proceeding on the basic premise that the filing of tax returns and the payment of tax assessments levied subsequent to the appointment of a receiver under Chapter XI proceedings and the commencement of the receiver's operation of the debtor's business do not constitute a part of that business operation. Furthermore, the Court below erroneously concluded that the penalty imposed by Section 6511 of the California Sales and Use Tax Law for failure to file returns required by that law could have been avoided by respondent only by payment of the tax which would have been disclosed by returns for the period involved if returns had been prepared and filed.

Specification of Errors to Be Urged.

The Court of Appeals erred:

1. In holding that the penalty provided for by Section 6511 of the California Sales and Use Tax Law (the $293.84 item) is imposed not merely for failure to file, but also in cases where timely returns are filed without payment of the self-assessed tax disclosed thereon.

2. In holding that the filing of tax returns and the payment of tax assessments within the period prescribed by a state taxing statute and during the period a receiver is conducting a debtor's business under Chapter XI of the Bankruptcy Act do not constitute an essential part of that business operation.

3. In holding that the penalties imposed by the California Sales and Use Tax Law as a result of the receiver's failure to file returns and pay taxes as they became due subsequent to the commencement of the receiver's operation of the debtor's business should not have been allowed as expenses of administration.

4. In holding, additionally, that said penalty items could not even be allowed under Section 307 of the Bankruptcy Act (11 U. S. C., Sec. 707) as contingent claims to be paid under the extension provisions of the debtor's plan of arrangement.

Reasons for Granting the Writ.

(1) The primary question presented is one regarding the duties and obligations of a receiver appointed in proceedings under Chapter XI of the Bankruptcy Act insofar as compliance with taxing statutes is concerned, and is of great importance in the administration not only of Federal bankruptcy laws but Federal and State taxing statutes as well. If the decision below is to stand, it necessarily follows that the filing of tax returns and the payment of taxes due for any period can be indefinitely avoided without penalty merely by the filing of a petition under Chapter XI of the Bankruptcy Act prior to the statutory filing and/or payment date. This would be true regardless of the amount of tax or whether a State or Federal taxing statute is involved and would enable a receiver to continue the operation of a taxpayer's business and the proposal of plans of arrangement where a significant tax liability has been neither disclosed nor determined. Furthermore, Federal and State taxing agencies would be in doubt as to whether the debtor or the receiver should be looked to for the returns in question. It would appear that the debtor should not be required to file returns for the period immediately preceding the commencement of Chapter XI proceedings since all the books and records are in the receiver's possession. And it would seem to follow almost as a matter of course that the duly appointed custodian of the books and records of a taxpayer should be under a duty to use those records for the preparation and filing of returns as they become due. Similarly, it would appear that a receiver should not be permitted to continue the operation of a taxpayer's business under Chapter XI of the Bankruptcy Act if he

cannot satisfy tax assessments as they are made during the course of his operation. Certainly it would appear either that continued operation by the receiver under these circumstances is improper or that tax assessments may be levied and collected by tax agencies in the same manner as if the debtor had not come into the Bankruptcy Court. At any rate, it is essential that a receiver's duties and obligations under State and Federal taxing statutes in factual situations such as this be clearly and finally defined.

(2) The decision of the Court below in the instant case is in conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *In re Chicago and N. W. Ry. Co.; Thomson v. Toman,* 119 F. 2d 971, wherein a Section 77 railroad-debtor trustee was held liable for tax penalties under analogous circumstances.

(3) The decision of the Court below disregards the clear, unambiguous language of Section 959(b), 28 U. S. C. That section provides simply that a receiver appointed in any court of the United States is under a duty to manage and operate the property in his possession according to the requirements of the valid laws of the state in which the property is situated in the same manner as the owner thereof would be bound to do if still in possession.

(4) The decision of the Court below disregards the clear requirement of Section 960, 28 U. S. C., that officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State, and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

(5) The decision of the Court below is in conflict with the views heretofore expressed in various decisions relating to the duties and obligations, from a tax viewpoint, of receivers conducting a business under authority of the Bankruptcy Act.

Palmer v. Webster, etc., 312 U. S. 156, 61 S. Ct. 542;

Boteler v. Ingels, 308 U. S. 57, 521, 60 S. Ct. 29;

Thomson v. Toman (C. C. A. 7), 119 F. 2d 971;

In re Knox-Powell-Stockton Co., 100 F. 2d 979, 983;

State of California v. Hisey (C. C. A. 9), 84 F. 2d 802, 805;

Laugharn v. Carter, 19 Cal. 2d 454.

(6) The decision of the Court below disregards the clear language of Section 6511 of the California Sales and Use Tax Law which clearly provides for the imposition of a penalty for failure to file returns *regardless* of whether or not payment is made. The decision of the Court below is in part predicated on the erroneous premise (for which there is no legal or factual basis) that the penalty imposed by Section 6511 of the California Sales and Use Tax Law is imposed for non-payment *and* failure to file.

(7) The decision of the Court below is believed to be erroneous in that it disregards the clear language of Section 307 of the Bankruptcy Act (11 U. S. C., Sec. 707). That section defines "debts" or "claims" for Chapter XI purposes as including claims of *whatever character* against the debtor *whether or not provable* in straight bankruptcy

proceedings, and regardless of whether the debts or claims are liquidated or unliquidated, fixed *or contingent.*

It is petitioner's view that the penalties here involved were, at the very least, contingent debts of Exeter at the time that Chapter XI proceedings were commenced. The California Sales Tax is imposed upon retailers for the privilege of selling tangible personal property at retail, the tax amounting to a specified percentage of the gross receipts derived by the retailer from those sales. It is obvious, therefore, that the tax principal due for the period involved, namely, the period July 1, 1947, to October 16, 1947, could have been ascertained simply by taking from Exeter's books the figures disclosing total receipts from sales of tangible personal property at retail and multiplying by 2½% (the rate in effect during the period in question). The amount of tax due being thus simply computed, the penalty for failure to file returns disclosing that tax liability could likewise have been simply computed by multiplying the tax principal by 10% (the penalty provided for by Section 6511 of the California Sales and Use Tax Law). The penalty imposed for failure to pay the aforesaid tax liability after its assessment could similarly have been computed by again taking 10% of the tax principal as provided by Section 6565 of the California Sales and Use Tax Law.

(8) The decision of the Court below is believed to be erroneous insofar as it holds that Section 57(j) of the Bankruptcy Act (11 U. S. C., Sec. 93(j)), is applicable

to Chapter XI proceedings. It is petitioner's contention that Section 57(j) does not apply to Chapter XI proceedings by virtue of the clear language contained in Sections 302 and 307 of the Bankruptcy Act, and the following authorities:

Boteler v. Ingels, 308 U. S. 57, 60, 521, 60 S. Ct. 29;

Thomson v. Toman (C. C. A. 7), 119 F. 2d 971;

State of Missouri v. Earhart, 111 F. 2d 992;

154 A. L. R. 1255.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRED N. HOWSER,
Attorney General;

WALTER L. BOWERS,
Assistant Attorney General;

JAMES E. SABINE,
Deputy Attorney General;

EDWARD SUMNER,
Deputy Attorney General,
Attorneys for Petitioner.

APPENDIX.

PERTINENT STATUTORY PROVISIONS.

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6051.

"The taxes imposed by this part are due and payable to the board quarterly on or before the last day of the month next succeeding each quarterly period."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6451.

"On or before the last day of the month following each quarterly period of three months, a return for the preceding quarterly period shall be filed with the board in such form as the board may prescribe.

"For purposes of the sales tax a return shall be filed by every seller. For purposes of the use tax a return shall be filed by every retailer maintaining a place of business in the State and by every person purchasing tangible personal property, the storage, use, or other consumption of which is subject to the use tax, who has not paid the use tax due to a retailer required to collect the tax. Re-

turns shall be signed by the person required to file the return or by his duly authorized agent but need not be verified by oath."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6452.

"The board for good cause may extend for not to exceed one month the time for making any return or paying any amount required to be paid under this part. The extension may be granted at any time provided a request therefor is filed with the board within or prior to the period for which the extension may be granted.

"Any person to whom an extension is granted shall pay, in addition to the tax, interest at the rate of one-half of 1 per cent per month, or fraction thereof, from the date on which the tax would have been due without the extension until the date of payment."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6459.

"If any person fails to make a return, the board shall make an estimate of the amount of the gross receipts of the person, or, as the case may be, of the amount of the total sales price of tangible personal property sold or purchased by the person, the storage, use, or other consumption of which in this State is subject to the use tax. The estimate shall be made for the period or periods in respect to which the person failed to make a return and shall be based upon any information which is in the board's possession or may come in its possession. Upon the basis of this estimate the board shall compute and determine the amount required to be paid to the State, adding

to the sum thus arrived at a penalty equal to 10 per cent thereof. One or more determinations may be made for one or for more than one period."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6511, Art 3, Chap. 5, Part I, Division 2.

"Any person against whom a determination is made under Articles 2 or 3 of this chapter or any person directly interested may petition for a redetermination within 30 days after service upon the person of notice thereof. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the period."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6561.

"All determinations made by the board under Articles 2 or 3 of this chapter are due and payable at the time they become final. If they are not paid when due and payable, a penalty of 10 per cent of the amount of the determination, exclusive of interest and penalties, shall be added thereto."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6565.

"Unless inconsistent with the context and for the purposes of an arrangement *providing for an extension* of time for payment of debts in full and applicable exclusively to the debts to be extended—

(1) 'creditors' shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 63

of this Act and whether liquidated or unliquidated, fixed or contingent; and

(2) 'debts' or 'claims' shall include all unsecured debts, demands, or claims *of whatever character* against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or *contingent.*" (Emphasis added.)

Bankruptcy Act, Section 307.

"Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion; *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act."

Bankruptcy Act, Section 57d.

"Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Bankruptcy Act, Section 57j.

"A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

28 U. S. C. A., Section 959b.

"Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

28 U. S. C. A., Section 960.